

Letter of Findings Number: 04-20120317
Sales/Use Tax
For Tax Years 2009 and 2010

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ISSUES

I. Sales/Use Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-12; IC § 6-8.1-5-1; IC § 9-22-6-2; [45 IAC 2.2-4-33](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012).

Taxpayer protests the proposed assessments, claiming it was not responsible for the sales tax.

II. Tax Administration – Interest.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of statutory interest.

III. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana company which offers towing services. In addition to the towing services, Taxpayer also conducts a weekly auction of the vehicles that were towed to Taxpayer's facility but were not claimed by the owners of the vehicles.

In 2011, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records. Pursuant to the audit, the Department determined that Taxpayer failed to collect sales tax on the vehicles it sold at its weekly auctions. The Department audit also determined that Taxpayer purchased certain tangible personal property to be used in the course of its business activities but did not pay sales tax or use tax. As a result, the Department assessed additional sales tax, use tax, penalty, and interest.

Taxpayer only protested the Department's assessments on the sales tax concerning the unclaimed vehicles which Taxpayer sold at its weekly auction. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales/Use Tax – Imposition.

DISCUSSION

The Department's audit concluded that Taxpayer, as a retail merchant, failed to collect and remit the sales tax on the vehicles that Taxpayer sold at its weekly auctions at its business location. The Department assessed sales tax on these transactions.

Taxpayer, to the contrary, claimed that it was not responsible for collecting the sales tax. Specifically, Taxpayer asserted that it was not a car dealer; rather, it operates towing services and acquired the "mechanic's lien" on the vehicles when the towed vehicles were not claimed by the titled owners after a certain number days pursuant to Indiana law. Taxpayer thus argued that it was not liable for the sales tax on the vehicles sold at its weekly auctions because it had the right to sell those unclaimed vehicles to recoup its costs in providing the towing services and storage.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. **The retail merchant shall collect the tax as agent for the state.**

(Emphasis added).

IC § 6-2.5-4-12(a) explains that "[a] person is a retail merchant making a retail transaction when he sells tangible personal property at auction." [45 IAC 2.2-4-33](#) further illustrates:

Every person engaged in the business of making **sales at auction of tangible personal property owned by such person or others, shall be and constitute a retail merchant making retail transactions** in respect thereto and the gross income received therefrom shall constitute gross retail income of a retail merchant

received from retail transactions. (**Emphasis added**).

At the administrative hearing, Taxpayer stated that the owners of the towed vehicles were responsible for fees, including a towing fee, a storage fee, and a processing fee, for the towing services and parking/storage at its facility. Taxpayer explained that it had the "mechanic's liens" on those vehicles that it towed to its facility "under Indiana law." (Presumably, Taxpayer referred to the "mechanic's lien" outlined in IC § 9-22-6-2.) Taxpayer further stated that it obtained the information concerning the titled owners of the vehicles and notified the owners to re-claim their vehicles. Taxpayer asserted that when the titled owners were notified but failed to re-claim their vehicles prior to the specified date stated in the notices, it was allowed by law to "sell" the unclaimed vehicles to recoup its costs. Thus, Taxpayer asserted that it was not a car dealer and was not responsible for collecting and remitting the sales tax; rather, it simply exercised its right to recoup its costs for the services it rendered. To support its protest, Taxpayer submitted a sample copy of the paperwork package concerning the auction sale of a vehicle. In addition, Taxpayer provided a copy of the Indiana Bureau of Motor Vehicles' Mechanic's Lien Application information, which was also available on the Indiana Bureau of Motor Vehicles' website at <http://www.in.gov/bmv/2958.htm>.

Taxpayer's reliance on the "mechanic's lien" is misplaced. IC § 9-22 et seq. addresses matters of motor vehicles. Specifically, IC § 9-22-6-2 provides a service provider, such as Taxpayer here, a statutory recourse to be compensated for services it performed on the vehicles when the owners failed to pay the service provider. Thus, that statutory recourse ensures Taxpayer's right to fair compensation and intends to timely resolve potential legal disputes between the vehicle owners and the service providers.

The issue in this protest, however, is not whether Taxpayer "may sell" the unclaimed vehicles because it had the "mechanic lien" on the unclaimed vehicles. Rather, the issue in this case is whether Taxpayer engaged in the business of making sales at auction of tangible personal property owned by others. That is, was Taxpayer a retail merchant making retail transactions with the obligation to collect the sales tax as agent for the state pursuant to IC § 6-2.5-2-1?

Taxpayer's documentation demonstrates that it periodically advertised in a local newspaper a list of vehicles for public sale (auction) at its business location on a specific date; the advertisements also include the vehicle models, the vehicle identification numbers, and the prices. Taxpayer subsequently sold the vehicles to the highest bidder at the auctions. Thus, Taxpayer, in the ordinary course of its regular business, conducted auctions at its business location to sell the unclaimed vehicles owned by others and was a person "engaged in the business of making sales at auction of tangible personal property owned by others." Thus, Taxpayer was "a retail merchant making retail transactions" pursuant to IC § 6-2.5-4-12(a) and [45 IAC 2.2-4-33](#) and was required to collect the sales tax at the time of the auction sales took place.

Finally, Taxpayer provided several copies of the general exemption certificates, claiming some purchasers were exempt from the sales tax. However, Taxpayer's documentation failed to show which specific transactions were claimed to be exempt sales. Thus, given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer has met its burden of proof demonstrating that the Department's assessment is wrong.

Pursuant to the above mentioned statute and regulation, Taxpayer was a retail merchant making a retail transaction and thus was responsible for collecting the sales tax on the vehicles sold at its weekly auction sales.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Interest.

DISCUSSION

The Department assessed interest on the tax liabilities. Taxpayer protested the imposition of interest.

IC § 6-8.1-10-1(a) provides, as follows:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

Pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest.

FINDING

Taxpayer's protest regarding the imposition of interest is respectfully denied.

III. Tax Administration – Negligence Penalty.

DISCUSSION

The Department's audit imposed a ten percent negligence penalty for the tax period in question. Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;

- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this instance, Taxpayer has demonstrated reasonable cause and therefore the Department will waive the penalty. Taxpayer's protest of the imposition of negligence penalty is sustained.

FINDING

Taxpayer's protest of the imposition of negligence penalty is sustained.

SUMMARY

For the reasons discussed above, Taxpayer's protest of the imposition of the sales tax is denied. Taxpayer's protest of the imposition of interest is also respectfully denied. Taxpayer's protest of the imposition of the negligence penalty is sustained.

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